In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 377

OYSTER SHELL PRODUCTS CORPORATION, INC.,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 66-68) is reported in 100 F. Supp. 378. The opinion of the Court of Appeals (R. 92-93) is reported at 197 F. 2d 1022.

JURISDICTION

The judgment of the Court of Appeals was entered July 24, 1952 (R. 93). The petition for

a writ of certiorari was filed October 4, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether in a condemnation proceeding instituted by the United States the court has jurisdiction to entertain a counterclaim asking an award for the alleged taking of property not included in the petition of the United States.

STATEMENT

On October 5, 1950, the United States, at the request of the Secretary of the Army, instituted proceedings to acquire a perpetual right to construct and maintain flood control works upon certain lands situated in St. Mary Parish, Louisiana, for use in connection with the West Atchafalaya Basin Protection Levee, Charenton Intracoastal Canal Levee Project known as the Morganza Floodway (R. 2-12). Only Tracts Nos. 5 and No. 8, aggregating 3.35 acres, located on the west side of the Atchafalaya River, owned by the petitioner, are here involved. Petitioner filed an answer and counterclaim (R. 15-25, 34-59). In the answer, it sought damages by reason of the taking and destruction of oyster shells and inventories of raw and semifinished oyster shell products on the lands condemned, and just compensation for the damage which it alleged will result to certain buildings and improvements located on the condemned

lands, which will be subject to overflow and inundation in the construction of the Morganza Floodway. In the counterclaim, petitioner sought damages for other land and improvements which it owns on the west bank of the Atchafalaya River, and for improvements located on land which it leases on the east bank of said river, all of which it alleges will be subject to overflow and inundation and rendered valueless by reason of the construction and operation of the Morganza Floodway. All of petitioner's properties are alleged to constitute a single going business (R. 54). Petitioner asked for a judgment for the loss of business and property in the amount of $3,150,000, which includes personal property alleged in the answer to have been taken or destroyed.

Upon motion of the United States (R. 60-61), the district court on September 14, 1951, entered a judgment dismissing the counterclaim (R. 68-69). The Court of Appeals affirmed the judgment, agreeing with the views of the district court (R. 66-68) that it had no jurisdiction to consider the counterclaim, which asserted a claim against the United States in a manner and in a court in which the United States has not consented to be sued (R. 92-93).

ARGUMENT

The decision of the Court of Appeals is correct and represents simply another application of a principle well settled in federal condemnation

law. Since the petition in condemnation did not describe the properties for which the petitioner seeks damages, the court has no jurisdiction to enter a judgment in this proceeding. *United States* v. *534.7 Acres of Land, Etc.*, 157 F. 2d 828, 831 (C.A. 5); *New York Telephone Co.* v. *United States*, 136 F. 2d 87 (C.A. 2); *Moody* v. *Wickard*, 136 F. 2d 801, 803-804 (C.A. D.C.), certiorari denied, 320 U.S. 775; *United States* v. *Shingle*, 91 F. 2d 85, 89 (C.A. 9), certiorari denied, 302 U.S. 746. These cases are merely applications of the rule that "the objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim." *Nassau Smelting Works* v. *United States*, 266 U.S. 101, 106. "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 514.

The portions of the statute under which the condemnation proceeding was instituted (Pet. 10-15, 19-21) do not vest any jurisdiction in the district court to award compensation for property not included in the condemnation proceeding. The language quoted on page 14 of the petition in regard to damages for "any injury to the part not taken" merely refers to possible "severance damages" to that part of the property which, though not taken, might be damaged as a result of

the taking of the condemned parcel or parcels. It does not apply to compensation for the alleged taking of other properties of the appellant. See *United States* v. *Miller*, 317 U.S. 369, 376. In this case, the district course made it clear that it was not excluding any claim for such severance damages (R. 67-68).

Petitioner's argument (Pet. 20-28) that the court may enlarge the amount of the land to be taken under the petition for condemnation so as to include all of its property, asks the court to invade the province of administrative officials. As stated by petitioner (Pet. 10-15, 17-23), the statute clearly confers broad powers on the Chief of Engineers and the Secretary of the Army in regard to the acquisition of land, but nowhere does it confer jurisdiction upon the court to adjudicate questions relating to a larger quantity of property than that which was sought to be condemned by the administrative officials. None of the cases relied upon by petitioner in this connection (Pet. 16-19, 24-28) supports its contention of the existence of such a power in the court to enlarge the scope of condemnation proceedings.[1] Nor can Articles 375 and 377, Louisiana Code of

[1] The question in the case of *United States* v. *Sargent*, 162 Fed. 81 (C.A. 8) (Pet. 30-31) was simply whether the United States should pay interest on the amount awarded for the land condemned.

Practice[2] (Pet. 4, 16, 33-34) operate to permit suit against the United States without its consent (*United States* v. *Miller*, 317 U.S. 369, 379). The irrelevancy of *United States* v. *The Thekla*, 266 U.S. 328, relied upon by petitioner (Pet. 29-30) to sustain jurisdiction in the instant case, is clearly shown by this Court in *United States* v. *Shaw*, 309 U.S. 495, 502-504.

The argument that the Morganza Floodway project would result in a taking of property rights extending far beyond the rights sought to be condemned in the petition for condemnation (Pet. 18-23) does not confer jurisdiction on the district court. We by no means admit the validity of the argument that there has been such a taking (see, *e.g.*, *United States* v. *Sponenbarger*, 308 U.S. 256), but even so, it is clear that the claim for compensation therefor cannot be asserted in this proceed-

---

[2] These statutes would not even confer jurisdiction on a state court in Louisiana in a condemnation proceeding. It is the rule in Louisiana in such proceedings that the landowner is not entitled to recover damages sustained to property other than that directly involved in the proceeding. *Louisiana Ry. & Navigation Co.* v. *Sarpy*, 125 La. 388, 391, 51 So. 433 (1910); *Louisiana Ry. & Nav. Co.* v. *Xavier Realty*, 115 La. 328, 342, 39 So. 1 (1905); *Louisiana Highway Commission* v. *Giaccone*, 19 La. App. 446, 140 So. 286 (1932); *Acosta* v. *Board of Com'rs. Orleans Levee Dist.*, 12 La. App. 488, 126 So. 463 (1930). Insofar as the matter is simply one of procedure, it would seem to be governed by the Federal Rules of Civil Procedure, since the Government's motion and the judgment of dismissal both occurred after the effective date of the new Rule 71(A).

ing. The alleged damages could be recovered only in the Court of Claims under the Tucker Act (28 U.S.C. 1491).

CONCLUSION

The decision below is clearly correct and no conflict of decisions is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys.

NOVEMBER 1952

☆U.S. GOVERNMENT PRINTING OFFICE 1952—228124/P.O.589